Supreme Court of the United States

October Term, 1953

No. 789

COMPAGNIE NATIONALE AIR FRANCE,

Petitioner-Defendant,

—against—

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased,

Plaintiff-Respondent.

RESPONDENT'S BRIEF

Statement

At the outset the attention of this court is respectfully called to the following facts as to the status of the action which, apart from any other considerations, render the Petition for a Writ of Certiorari, inappropriate and groundless, and require its denial:

1. The decision of the Court of Appeals below merely constituted a denial of Defendant-Petitioner's motion for summary judgment (made on the ground that Plaintiff-Respondent was not the real party in interest). The action for wrongful death is now awaiting trial on the merits and there are no real issues present here.

2. In any event the basic issue of "real party in interest" has for all practical purposes been rendered moot by a written stipulation agreeing to consolidate their respective actions for wrongful death against Defendant-Petitioner entered into, after the decision of the Court of Appeals, between Plaintiff-Respondent and Royal Indemnity Company, the alleged statutory assignee of the death claim (a copy of this stipulation is annexed hereto as Appendix I to Respondent's brief).

The Action (which is now awaiting trial)

This is an action brought by the Plaintiff-Respondent, as Administratrix of Emery Komlos, deceased, an American citizen, against Petitioner, a foreign flag air carrier, for damages for decedent's wrongful death on October 28th, 1949, while a passenger in a transport plane owned, operated and controlled by the petitioner, which crashed in the Azores, Portugal, destroying the airplane and fatally injuring passengers and crew. At the time of his death the decedent was thirty-two years old and was survived by the Respondent, Edith Komlos, his sister, and his mother, Bertha Komlos, residents and citizens of New York.

The amended complaint (R. Vol. I, 6a) alleges that the aforesaid next of kin of the decedent were dependent upon him for their support and maintenance and as a result of his death, have been deprived thereof and of his society and comfort, and have suffered mental pain and anguish, loss of his companionship, and have suffered material, monetary and "moral damages".

The action was instituted on October 26th, 1950, in the Supreme Court, New York County, and was thereafter removed to the United States District Court on the ground of diversity. The Defendant-Respondent did not serve or file its answer until about a year later. Except for admitting that decedent had been a passenger, the ownership and operation of the airplane and the fact that it crashed and decedent was killed, Petitioner denied the material allegations of the amended complaint (R. Vol. I, 12a).

Simultaneously with the service of its answer, Petitioner, moved for summary judgment dismissing the amended complaint on the ground that the Respondent was not the real party in interest and that the wrongful death claim had been assigned by operation of law under Section 29 of the New York Workmen's Compensation Law, to the compensation insurance carrier, Royal Indemnity Company (hereinafter called "Royal"), and that Royal, as such assignee, had commenced an action in the same court for the same relief upon a substantially identical complaint; that Section 29 became applicable because more than six months had elapsed from the date the Workmen's Compensation benefits had been awarded to decedent's mother before the decedent's estate instituted suit against Defendant-Petitioner (R. Vol. I, 1-14a).

As as alternative and companion motion, the Petitioner also moved to dismiss the complaint of the compensation insurance carrier, Royal (R. Vol. II, 15a), on the ground that "although the documentary proof shows that Royal owns the death claim, if the court decides otherwise the Royal complaint should be dismissed" (R. Vol. II, 11a). It should be noted that the Royal complaint makes no claim for "moral damages".

The Plaintiff-Respondent opposed the motion for summary judgment declaring it did not question the compensation carrier's lien on any recovery and made a cross-motion to consolidate the two actions (R. Vol. I, 30a).

The Decision of the Court of Appeals

The district court granted the motion as to Respondent's amended complaint and denied it as to the Royal complaint, also denying Respondent's motion to consolidate the actions (R. Vol. I, 83a-86a; R. Vol. II, 192a). There was only one appeal to the Court of Appeals, which was by this Respondent, from the judgment granting summary judgment, dismissing its amended complaint and from the order denying its motion to consolidate the two actions (R. Vol. I, 87a). The Court of Appeals, in its decision rendered December 30th, 1953, reversed the District Court and in denying the motion for summary judgment, held that:

> "1. For the death of Emery Komlos there is a single indivisible cause of action with two items of damage. Since the accident resulting in Komlos' death occurred within a province of Portugal, the Portugal law (the lex loci delicti) applies. Under it, the dependent of the deceased is entitled, upon proof of defendant's negligence, to damages for wrongful death and indemnity ("moral damages") for (fol. 197) the psychic suffering which the death caused to her" (R. Vol. II, 196).

The court below held further that since the claim for "moral damages" does not pass to the compensation insurance carrier, Royal, under Section 29 (2), an improper

splitting of the cause of action for Komlos' death would otherwise result, and that therefore the entire claim remained vested in the Administratrix of the estate for the benefit of the mother (R. Vol. II, 197) and that the Administratrix had the right to proceed with its action. Of course, this meant that Royal would still have its lien for compensation payments.

In denying a subsequent motion for a rehearing the court held that further data as to the applicable Portuguese law would be admissible at the trial (R. Vol. II, 236).

The Stipulation Consolidating the Two Actions Has Materially Changed the Relationship of the Parties so as to in effect Render the Petition Moot

In support of its motion for summary judgment in the district court, the Defendant-Petitioner urged that it, the tort feasor, "should not be called upon to defend two separate suits, brought by two different plaintiffs" (R. Vol. II, 14a). After the decision of the Court of Appeals below, the Plaintiff-Respondent entered into a written stipulation with Royal agreeing that the two actions be consolidated (Appendix I to Respondent's brief).

The stipulation provides that:

> "the above entitled action shall be consolidated forthwith for all purposes, with the action entitled 'Royal Indemnity Company vs. Compagnie Nationale Air France,' now pending in the United States District Court for the Southern District of New York, Civil Action No. 70-71, and that the title of the consolidated action shall be amended to read, 'Edith Komlos, as Administratrix of the Goods,

> Chattels and Credits of EMERY KOMLOS, Deceased, and the ROYAL INDEMNITY COMPANY, plaintiffs, against COMPAGNIE NATIONALE AIR FRANCE, defendant,' and that the United States Court of Appeals for the Second Circuit, and/or the United States District Court for the Southern District of New York, as the case may be, may make, amend or issue such judgment, order, decree, mandate or decision, with respect to the above described actions as will effectuate and implement the consolidation thereof, without further notice to either party hereto, and that the parties hereto will execute such further consents and papers as may be necessary to implement the purposes hereof, or as either of the aforesaid Courts may require."

This stipulation is on file in the Court of Appeals for the Second Circuit. Unfortunately, Respondent has not as yet had the opportunity to enter an order formally consolidating the two actions for the reason that before Respondent could do so, the Petitioner by a series of temporary stays and an order obtained in the District Court, has succeeded in staying the Respondent from any proceedings until the determination of this petition for a Writ of Certiorari.

It is clear, however, that the position and relationship of the parties has changed since the decision of the Court below inasmuch as the only parties that can have a claim against Air France have now united their claims and Petitioner is no longer in a position to complain of double jeopardy and "no real party in interest."

The Petition Fails to Meet the Requirements Under Rule 19 of the Rules of This Court

A. It should be emphasized that the petitioner herein is the wrongdoer that seeks, on some technical ground, to deprive the family of the deceased of its cause of action for wrongful death, claiming that it belongs to the compensation insurance carrier. The reasons why Petitioner has been spending considerable time and money in an effort to wrest this case from the family and vest it in the compensation carrier, are obviously in expectation of settling it with the compensation carrier for a nominal amount and are more fully discussed in the Record, Vol. I, on page 45a.

It was only after the decision below that the compensation carrier entered into the stipulation with the Plaintiff-Respondent agreeing to consolidate the two actions. But the Petitioner in a desperate attempt to further delay has refused to recognize that its only ground of any merit has been totally obliterated and it still persists in delaying a trial on the merits by the filing of a groundless petition for a Writ of Certiorari.

A reading of the Petition at once establishes that it is entirely without merit and fails to exhibit any reason why it should be given serious consideration.

B. All of the tortuous argument of Petitioner has failed to show that a federal question exists here and merely repeats arguments futilely made below. Petitioner argues state law rather than a federal question.

The main burden of the Petition is that the Court of Appeals below erred in interpreting the Statutory Law

of New York and the fact that the decision herein will adversely affect the administration of the Workmen's Compensation Law of New York. This concern of the Petitioner for the Workmen's Compensation Law is commendable, if sincere. The confused argument of the Petitioner for a liberal construction of the New York Law not only underlines the fact that no federal question exists, but sounds strange in the mouth of a third party wrongdoer in face of the well-known rule that the liberal construction of the Workmen's Compensation Law is to be applied in favor of the employee or his family and not against them. Petitioner confuses the area of extra-territorial application of the New York Compensation Act since all of the cases it cites merely hold that the benefits are to be applied extra-territorially and nothing else. It cites no New York decision on the application of Section 29 to the peculiar type of damages ("moral damages") allowable under foreign Law. There is none.

Petitioner on pages 6 and 7 of its Petition admits "moral damages" are not recoverable under New York Law, and yet seeks by implication to construe the foreign element of "moral damages" into New York Statutes. It is on this thin and untenable ground of alleged violation of a rule of statutory construction that Petitioner seeks a review here.

C. Petitioner's artificial attempt to raise a public and special question is ludicrous against the background of this case. It "views with alarm" and sheds crocodile tears over the imagined dire effects of the decision below on the administration of Workmen's Compensation. Obviously, compensation benefits remain as before, and the relationship between employer and employee is not affected.

The primary concern of the compensation laws is the employee not the third party wrongdoer.

D. The Warsaw Convention is also referred to in an attempt to create some kind of federal question. Without conceding the pertinence of Petitioner's citations on this point, it is respectfully submitted that whether or not the Warsaw Convention creates a cause of action is of no moment here since the accident took place in Portugal. The Warsaw Convention by treaty is as much the law of Portugal as it is the law of any other country adhering to the Convention (including the United States) and in that sense it becomes the local law of Portugal and to that extent is the *lex loci delicti.*

Nothing is said in the Warsaw Convention as to what the elements of damages are and how they are to be determined. This is a gap that necessarily would have to be supplied by other elements in the local law, the *Lex Loci Delicti.* The law of Portugal allows the recovery of "moral" as well as material damages in an action for wrongful death. These are substantive rights, inseparable from the claim for wrongful death, as has been held by the Court below. The issues raised by the Petitioner are demonstrably spurious.

E. It is respectfully submitted that disposition of this matter in this Court will not finally dispose of the matter, nor was there a final disposition of the matter in the Court below.

The fact that the judgment sought to be reviewed is not final of itself under the circumstances, furnishes sufficient ground for the denial of the application. The conditions that require the extraordinary intervention of this Court do not exist here. There are no jurisdictional issues to be

decided fundamental to the further conduct of the case. There are no real issues present which cannot be raised upon the trial on the merits before the District Court, wherein the claims of the family of the deceased and the lienor, Royal, are consolidated, and which cannot be decided in a final judgment by the Trial Court. Surely the Petitioner does not seriously argue that its contentions here would dispose of the claim for wrongful death of Emery Komlos.

CONCLUSION

The Petitioner, by its mock concern for the relative rights of the decedent's family and of Royal, and by various maneuvers, has now succeeded in preventing the claim against it, the wrongdoer, from proceeding on the merits for nearly four years. The Petition herein clearly has no merit and is interposed in a desperate attempt for further delay. No ground whatsoever has been shown for the intervention of this Court.

The original underlying claim of "not real party in interest" first advanced by petitioner, as a ground for the granting of its motion for summary judgment, has in effect vanished. Both the family and the compensation carrier have united their claims and now seek a long delayed determination as to the liability of Petitioner for the death of Emery Komlos.

WHEREFORE, it is respectfully submitted that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

THEODORE E. WOLCOTT
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Attorneys for Plaintiff-Respondent

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Second Circuit

Edith Komlos, as Administratrix of the Goods, Chattels and Credits of Emery Komlos, Deceased,

Plaintiff,

—against—

Campagnie Nationale Air France,

Defendant.

It is hereby stipulated, consented and agreed, subject to the approval of the United States Court of Appeals for the Second Circuit, by and between the attorneys for Edith Komlos, as Administratrix of the Goods, Chattels and Credits of Emery Komlos, deceased, plaintiff in the above entitled action, and the attorneys for Royal Indemnity Company, that the above entitled action shall be consolidated forthwith for all purposes, with the action entitled "Royal Indemnity Company vs. Compagnie Nationale Air France," now pending in the United States District Court for the Southern District of New York, Civil Action No. 70-71, and that the title of the consolidated action shall be amended to read, "Edith Komlos, as Administratrix of the Goods, Chattels and Credits of Emery Komlos, deceased, and the Royal Indemnity Company, plaintiffs, against Campagnie Nationale Air France, defendant," and that the United States Court of Appeals for the Second Circuit, and/or the United States District Court for the Southern District of New York, as the case may be, may

make, amend or issue such judgment, order, decree, mandate or decision, with respect to the above described actions as will effectuate and implement the consolidation thereof, without further notice to either party hereto, and that the parties hereto will execute such further consents and papers as may be necessary to implement the purposes hereof, or as either of the aforesaid Courts may require.

Dated: New York, March 19, 1954.

THEODORE E. WOLCOTT & FREDERICK W. SCHOLEM
Attorneys for Edith Komlos, as
Administratrix, etc.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 96

COMPAGNIE NATIONALE AIR FRANCE,

Petitioner,

against

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased,

Plaintiff-Respondent.

PETITIONER'S REPLY BRIEF

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